People v. *Jenners*, 5 Mich. 305; *Maher* v. *People*, 10 Id. 212; and *Durant* v. *People*, 13 Id. 351. The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts and weigh the evidence. The law has established this tribunal because it is believed that from its members, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common-sense view of a set of circumstances involving both act and intent, than any single man, however pure and eminent he may be. This is the theory of the law, and as applied to criminal accusations it is eminently wise and favorable alike to liberty and to justice. But to give it full effect the jury must be left to weigh the evidence and to examine the alleged motives by their own tests. They cannot properly be furnished for the purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously say they believe such an intent to exist.

Upon a full consideration of this case, we are compelled to say we find some errors in the record, for which the conviction should be set aside, and a new trial awarded.

Supreme Court of Wisconsin.

NATHANIEL W. DEAN, Appellant, *v.* WILLIAM CHARLTON, Treasurer, &c., and Others, Respondents.[1]

Where a city charter required that all work should be let by contract to the lowest bidder, *held*, that the city authorities could not contract at all for laying the Nicholson pavement, the right to lay it being a patented right and owned by a single firm, and, therefore, the work being one which could not be open to competition.

Paine, J.—This was a bill in equity to enjoin the sale of the plaintiff's lands for an assessment imposed upon them for paving the streets in front of them with what is known as the Nicholson pavement. It is claimed that the proceedings failed in several

[1] We are indebted for the opinion in this case to the Hon. O. M. Conover, Reporter for the State of Wisconsin.—Eds. Am. Law Reg.

respects to comply with the provisions of the charter, in matters so essential as to render the tax void. But another objection is taken, which goes to the foundation of the whole proceeding; and the conclusion to which a majority of the court have come upon that, will preclude the necessity of examining any of the other questions. This objection is based upon the provisions of the charter requiring all work to be let by contract to the lowest bidder, and the fact that the right to lay the Nicholson pavement is a patented right, and was owned for the state of Wisconsin by one firm in the city of Milwaukie. It is said that the charter authorizes a contract only for such work as is open to competition, and that this work was not open to competition, because nobody had any legal right to do it except the one firm that owned the patent. Upon these facts alone the objection seems to me unanswerable. And nothing seems to be necessary, beyond the simple statement of the requirement of the charter as to the mode of letting work, and the fact that this right was a monopoly, to show that the charter is inapplicable to it, and that a contract for this work would be in violation of the necessary implication from its provisions.

Indeed the counsel for the respondent, by their course of argument, seemed tacitly to admit that there was an apparent incongruity in applying the provisions of the charter to a contract for such work as this. And they sought to avoid it in two modes. First, they claimed that if it was clear that the charter could not be applied in such a case; that it would be a mere farce to advertise to let to the lowest bidder work which only one firm had any legal right to do, so that the very object of the charter—to procure the work to be done as cheaply as possible—might be defeated thereby; then it must be assumed that the legislature did not intend the mode provided in the charter to be applicable, and that the work might be contracted for without regard to that mode.

The other mode of avoiding the objection was by proving that the owners of the patent were anxious and willing to sell the royalty, and had offered it for sixteen cents per square yard. And upon this proof it is insisted that the principle of competition was preserved, and the requirements of the charter complied with. I will state, as briefly as may be, why I think neither of these theories overcomes the objection. The first assumes the correctness of the position that the charter cannot be applied to a con-

tract for work the right to do which is a patented monopoly. And it then infers that because the charter is inapplicable, the city had the general power to make the contract, without regard to its restrictions, and that such was the legislative intent. The error lies in this inference. This position was attempted to be supported mainly by the case of *The Harlem Gas Co.* v. *The Mayor, &c.*, 33 N. Y. 309. The counsel on both sides rely upon that case, and it will therefore be proper to examine it carefully to see what position it sustains.

The action was on a contract for lighting certain streets in New York city with gas. The company had by law the exclusive right to furnish gas for that part of the city. The charter required all contracts for work and supplies, beyond a certain limitation in value which this contract far exceeded, to be let by contract to the lowest bidder. The contract for this gas was not so let, and therefore it was claimed to be void. The court held that, inasmuch as the company had the exclusive right to furnish the gas, the provision of the charter requiring the contract to be let to the lowest bidder was inapplicable, and that it would be absurd to attempt to apply the provision in such a case. PORTER, J., says: "In the present case, an adoption of the construction claimed by the municipal authorities would lead to the absurd conclusion that the legislature designed to force a provision into the city charter compelling the corporation to pay whatever price the sole bidder might choose to exact in his sealed proposals for the use of property in which he has an absolute monopoly, and in relation to which there can be no competition within the range of legal possibility." BROWN, J., says: "Had the common council, in place of this condition, invited proposals in the usual form, there could have been but a single offer at best, and the provisions of the statute would have failed of effect, because they were not applicable to such a subject."

The case therefore fully sustains the position of the appellant's counsel, which seems obvious enough in itself, that a provision requiring work to be let to the lowest bidder, is not applicable to a contract for work as to which there can be no competition. And if not applicable to it, of course it can furnish no authority for such contract. And if such a contract is made, it must be sustained, if at all, by authority derived from some other source than such a provision of the charter.

But the court in that case did hold the contract valid, and the city liable, and this branch of the decision the respondent's counsel rely upon to sustain their position, that if the charter was inapplicable, these proceedings should be sustained, whether conducted in accordance with it or not. But the cases are so different in respect to the grounds of that part of the decision, that it becomes inapplicable here. The power to contract for the lighting of the streets of the city was assumed in that case to be one of the general powers of a municipal corporation. Hence, so soon as the court came to the conclusion that the mode of contracting pointed out in the charter was inapplicable in such a case as they had under consideration, they had no difficulty in sustaining the contract under the general corporate power of the city. But here the question is quite different. It is not necessary to inquire whether the city of Madison, by virtue of its existence as a municipal corporation, would have had the power to contract for paving its streets with the Nicholson pavement, at the expense of the city, after discovering that the provisions of the charter enabling it to cause its streets to be paved at the expense of the lots, were inapplicable for that purpose. If it had such power, and had made such a contract binding the city at large, the question would then have been like that decided by the New York court. But here it made no such attempt. It seeks here to charge the expense upon the lots, and this it has no general power to do by virtue of its mere existence as a municipal corporation; but, if done at all, it can only be done under the statutory authority in its charter, and by complying substantially, if not strictly, with all its requirements. So soon, therefore, as we arrive at the conclusion that these requirements are inapplicable and inadequate to a contract for a work, the right to do which is an exclusive monopoly, it ends the question; for there is no general power of the city to fall back upon. I think, therefore, that while the case in New York does show that the contract in this case was outside of the scope of the provisions of the charter, it fails to show any general authority in the city by which it could be sustained, independent of those provisions. In truth, it would seem too late for us now to say that these requirements of the charter are not applicable to contracts for paving streets, for the contrary has uniformly been held by this and other courts: *Myrick* v. *La Crosse*, 17 Wis. 442; *Mitchell* v. *Milwaukie*, 18

Id. 92; *Kneeland* v. *Furlong*, 20 Id. 437; *Brady* v. *New York*, 20 N. Y. 312.

Neither can I see that the other mode of answering the objection is successful. On proof that the owners of the patent were willing to sell the "royalty," as it is called, for sixteen cents per yard, it is said that other parties might have bid, and the principle of competition was preserved. If an arrangement had previously been made, by which the owners of the patent became bound to transfer the right at sixteen cents per yard, and the contracts had been let in pursuance of the charter, for the materials and labor, subject to the condition of obtaining the patent, the principle of competition, so far as the labor and material were concerned, might have been preserved. But even in that case there could have been no competition as to the price of the royalty. So far as that constituted a part of the cost, there was no possibility of introducing this principle at all. But if the method suggested had been resorted to, so as to preserve competition in the labor and materials, perhaps the fact that it could not be preserved as to the comparatively small balance of the expense, would not have avoided the whole. It is unnecessary to determine whether so strict an application of the spirit of the charter would have been required.

But no such method was resorted to. On the contrary, the proposals were for furnishing the materials and doing the work, without anything in regard to the price of the royalty, and without any previous agreement with the owners of it. There could be no competition in this method. The fact that the owners were willing to sell it at sixteen cents per yard, does not show that there could have been. For, assuming that any contractor might have safely relied on the willingness of the owners to sell it at that price,—assuming that the latter, in case they desired to bid for the work themselves, would not use their power over the patent to aid in obtaining the contract, as far as possible, by preventing others from getting it,—assumptions which it would scarcely be safe for contractors to act upon,—still, there could have been no safety in bidding. For, suppose A., B., and C. all bid, none of them making any previous arrangement for the purchase of the royalty. Before the bids are opened, one of them thinking, to get the contract, desiring in good faith to do the work, goes to the owner of the patent and buys the royalty, for that part of the

city where the work is ordered to be done. The bids are opened, and some one else has the lowest bid, and gets the contract. What position would the successful bidder be in, bound under somewhat severe penalties to enter into and complete his contract, and yet with a rival and disappointed bidder having the sole legal right to do the work? Certainly, this shows that no contractor could safely bid, and bind himself in the manner here required, with sureties and stipulated damages for a failure, without in the first place procuring the right from the owners. For, although they might be willing to sell, that very willingness would make it unsafe for him; because some other bidder might step in and secure the right, in anticipation of the opening of the bids. But if any contractor should, before bidding, purchase the right, then nobody except him could safely bid. It seems clear, therefore, that proof merely of the willingness of the owners to sell the right at a fixed price, does not preserve competition. And the result in this instance, if not conclusive, is yet very satisfactory proof of it. There was no bid except that of the owners of the patent.

It has been compared to the case of work ordered to be done with a particular kind of stone, the quarry of which is owned by one who is willing to sell to all alike at a fixed price. Undoubtedly in that case there might be free competition. If the owner of the quarry, before the contract was let, should sell to one bidder enough stone for the work, he might the next day sell as much to another bidder. And if neither of these should get it, he might afterwards sell whatever was needed to such person as did get the contract. Such being the case, any bidder could safely wait until he obtained the contract before making arrangements for his stone. But there is a marked difference in the case of the patent. There the owner having disposed of the right for any particular district to one person, cannot afterwards furnish the same right to any other. This difference destroys the whole force of the illustration, and shows that the safety of bidders would be very different in the two cases.

It seems to me, therefore, a conclusion derivable from the very nature of the case, that competition could not be, and was not, preserved in the letting of this contract; and that it was, therefore, beyond the scope and in violation of the spirit of the charter.

It may be said that this pavement is of a superior character, and that it is very desirable that cities should have authority to cause it to be laid. It may be so; but if so, I think the aid of the legislature will have to be invoked, and that there is no authority to contract for it, under charters which require the work to be let by contract to the lowest bidder.

It was suggested, that, even though this assessment should be held illegal, still there was nothing to show it to be inequitable, and, therefore, a court of equity ought not to interfere. But that principle has never been applied to these special assessments. And certainly it could not be applied where there is no legal authority to contract for the work at all, to pay for which the assessment was imposed.

The judgment must be reversed, and the cause remanded with directions to enter judgment for the plaintiff for a perpetual injunction, according to the prayer of the complaint.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.[1]

SUPREME COURT OF VERMONT.[2]

SUPREME COURT OF THE UNITED STATES.[3]

ACTION.

Assignability.—A right of action for wrongfully and without permission raising ores and minerals from land situate in another state, belonging to another person, and selling and converting them, is assignable, and may be prosecuted in the courts of this state, by one to whom the owner has assigned such ores and minerals and all claim for their wrongful conversion: *Hoy* v. *Smith et al.*, 49 Barb.

AGREEMENT.

Complaint on.—Although a complaint sets out an express agreement, it will be sustained by evidence of an implied: *Smith* v. *Lippincott et al.*, 49 Barb.

---

[1] From Hon. O. L. Barbour; to appear in Vol. 49 of his Reports.

[2] From W. G. Veazie, Esq., Reporter; to appear in 40 Vt. Rep.

[3] From J. W. Wallace, Esq., Reporter; to appear in Vol. 6 of his Reports.